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Supreme Court of the United States

APRIL TERM, 1960

No. 833

M. MELINDA BERRY, ADMINISTRATRIX OF THE ESTATE OF ROBERT H. BERRY, DECEASED, PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND CAROLINA POWER & LIGHT COMPANY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

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No. .....

M. MELINDA BERRY, ADMINISTRATRIX OF THE ESTATE OF ROBERT H. BERRY, DECEASED, PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND CAROLINA POWER & LIGHT COMPANY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays for a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 6, 1960.

OPINIONS BELOW

The opinion of the District Court (App. 33) was not reported. The opinion of the Court of Appeals (App. 19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1960. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS INVOLVED

1. When the locus of a diversity case is a state where the *scintilla* rule of evidence prevails, may a Federal Court, contrary to the doctrine of *Erie v. Tompkins*,[1] dispose of the case on motion for summary judgment under Rule 56 Fed. Rules Civ. Proc., 28 U. S. C. A. without affording the party resisting the motion the benefit of *scintilla* in determining the legal sufficiency of his evidence to withstand the motion?

2. When a diversity case is challenged by a motion for summary judgment under Rule 56 Fed. Rules Civ. Proc., 28 U. S. C. A., may a Federal Court, contrary to the doctrine of *Erie v. Tompkins*, dispose of the case by deciding the issue of ngligence according to a test of foreseeability different from that of the state where the action arises?

3. Where a diversity case is challenged by a motion for summary judgment under Rule 56, Fed. Rules Civ. Proc., 28 U. S. C. A., is it not an invasion of the province of the jury, contrary to the 7th Amendment to the United States Constitution, for the Court to dispose of he case by concluding questions of fact on issues of negligence in the light most favorable to the movant and most unfavorable to the party resisting the motion?

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[1] *Erie R. Co. v. Tompkins*. 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

4. Where a diversity case is challenged by a motion for summary judgment under Rule 56, Fed. Rules Civ. Proc., 28 U. S. C. A., is it not an invasion of the province of the jury, contrary to the 7th Amendment to the United States Constitution, for the Court to dispose of the case by concluding **mixed questions** of law and fact in the light most favorable to the movant and most unfavorable to the party resisting the motion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C. 2106

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF CASE

Petitioner, a resident of South Carolina, brought suit, in capacity of administratrix, against respondent Atlantic Coast Line Railroad Company, a Virginia corporation, and respondent Carolina Power & Light Company, a North Carolina corporation, for their joint and several negligence, first, in maintaining a high voltage, uninsulated electric power line in close proximity to a railroad sidetrack, and,

second, in parking there a freight car of steel required to be unloaded by a crane so that on the occasion involved, December 3, 1955, the crane being used to unload the steel from the freight car, came in contact with the high voltage, uninsulated electric power line and killed petitioner's son who was there assisting in the unloading operation—but not operating the crane.

The respondents moved the District Court for summary judgment primarily on the ground "that neither of the defendants was guilty of any actionable negligence which contributed to the injury and death of Robert H. Berry", heretofore identified as petitioner's son. The motion for summary judgment was heard on the pleadings, affidavits, exhibits and interrogatories of the parties and a discovery deposition of Calvin O. Berry taken by respondents on January 31, 1957.

The scene of the fatality is Revels Station, near Florence, South Carolina where the main line of the respondent Atlantic Coast Line Railroad Company, sometimes hereinafter referred to as the railroad company, runs in a north to south direction. At Revels Station the railroad company maintains a siding consisting of two sidetracks. The second of these sidetracks, the one here involved, was built by respondent railroad company in 1953. This sidetrack branches off from the first sidetrack and extends in a northeasterly direction towards and then alongside a high voltage, uninsulated electric power line of the respondent Carolina Power & Light Company, sometimes hereinafter referred to as the power company. A space of 70 feet lies between this sidetrack and the electric power line at the point where it branches off from the first sidetrack but this space narrows down to 25 feet at the point where the sidetrack terminates, and in this latter area the railroad company parked or spotted its freight car of steel for unloading.

The unloading operation was being performed by Wilhoit Steel Erectors, an independent contractor. Petitioner's son, a minor, sixteen years of age, was an employee of Wilhoit Steel Erectors and he was assisting in the unloading operation. In order to unload the freight car of steel a crane was positioned alongside the freight car and a tractor-trailer motor vehicle was situated on the other side of the crane so that the crane, operating between the two conveyances, lifted the steel out of the freight car, pivoted around, and then let the steel down onto the track. In the course of the unloading operation the cable extending from the boom of the crane came in contact with the power line while the crane was maneuvering a bundle of steel from the freight car to the track. Petitioner's son who was standing on the ground nearby was killed by the current of high voltage electricity which carried through the cable of the crane, into the steel, and through his body into the ground.

The District Court granted respondents' motion for summary judgment by passing a brief order of less than one hundred fifty words in which none of the evidence or issues of the case were discussed. (App. 34)

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, as to (1) whether respondent power company negligently maintained its high voltage, uninsulated electric power line too close to the sidetrack of respondent railroad company, (2) whether respondent railroad company negligently constructed and maintained its sidetrack too close to the high voltage, uninsulated electric power line of defendant power company, and (3) whether respondent railroad company negligently parked too close to respondent power company's high voltage, uninsulated electric power line the carload of steel required to be unloaded by a crane. There was testimony that a cause of the accident was the power line being

too close to the sidetrack. The sufficiency of this and other evidence to require submission of the case to the jury, as appears from the opinion of the Court of Appeals, was not tested by the *scintilla* rule which prevails in South Carolina. Moreover, the Court of Appeals, in passing upon the question of negligence decided the issue of foreseeability involved therein according to a test different from that embodied in the substantive law of South Carolina.

The decision of the Court of Appeals was rendered on January 6, 1960. Thereafter petititoner submitted a petition for rehearing,[2] taking the position that the Court of Appeals, in deciding questions of fact in the case, assumed the functions of the jury, and, more particularly, that opinion of the Court of Appeals showed on its face that the Court did not apply the *scintilla* rule, which prevails in Sotuh Carolina, in testing the legal sufficiency of petitioner's evidence. "Viewing the issue here under the *scintilla* rule which, as heretofore stated, prevails in South Carolina," the petition for rehearing asserted, "It is clear that in order for the Court to reserve for itself the task of determining whether or not defendant power company in the case here exercised the high degree of care required of it, the evidence thereabout must be **conclusive** and not **'some'** evidence of due care (App. 24), as was found by this Court in the instant case." Rehearing of the appeal on this and other grounds stated in the petition was denied by the Court below on February 29, 1960.

[2] Petitioner's petition for rehearing in the Court of Appeals was not permitted to be filed because the printed copies of the petition, due to mailing difficulties, did not reach the office of the Clerk of Court in time to be within the thirty day period allowed for filing of petition for rehearing. The Clerk of the Court of Appeals, however, by letter of February 29, 1960 advised petitioner as follows: "I have been instructed by the Court to inform you that the Court has read the petition and is of the opinion that it is without merit; and the Court has instructed me not to file the petition because it was not received within the time permitted by the rule." Therefore, it appears that the grounds stated in the petition were passed upon, informally however, by the Court of Appeals in its denial of a rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fourth Circuit is not in accord with the doctrine of *Erie v. Tompkins, supra*, and is in conflict with the decisions of other Circuit Courts: The issues involved in this petition for a writ of certiorari are (1) whether it is proper for a Court of Appeals to apply a state or federal test of sufficiency of evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship; and (2) whether a Court of Appeals has power to decide questions of fact and mixed questions of law and fact in negligence cases without invading the province of the jury contrary to the 7th Amendment to the United States Constitution.

On the first issue the substantive law of South Carolina regarding the applicable test for determining the sufficiency of evidence to support a jury verdict is clear. The substantive law of South Carolina regarding the applicable test of foreseeability in a negligence case is also clear. The *scintilla* rule of evidence prevails in South Carolina. *Woodle v. Brown*, 223 S. C. 204, 74 S. E. (2d) 914; *Wright v. Gilbert*, 227 S. C. 334, 88 S. E. (2d) 72. Under *scintilla* the well established rule in South Carolina is that "if there is **any testimony whatever** to go to the jury on an issue involved in a cause" the case must be submitted to the jury. *Callum v. Southern Railway Co.*, 189 S. C. 336, 1 S. E. (2d) 235.

On the first issue the opinions and practice of the Fourth Circuit Court of Appeals are in conflict with the opinions and practices of other Circuit Courts. In *Davis Frozen Foods, Inc., v. Norfolk Southern R. Co.* (C. A. 4, N. C.), 204 F. (2d) 839, and in prior decisions[3] the Fourth

[3] *McSweeney v. Prudential Ins. Co. of America* (C. A. 4, S. C.), 128 F. (2d) 660; *Gorham v. Mutual Ben. Health & Accident Ass'n* (C. A. 4, N. C.). In these cases the Fourth Circuit regards the language of this Court in *Herron v. Southern Pacific Co.*, 283 U. S. 91, as authority for its position. In none of these cases, however, does the Court comment on the effect of *Erie R. Co. v. Tompkins, supra*, or *Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 468, decided by this Court prior to *Davis*

Circuit Court of Appeals has resolved the question of whether there is a sufficiency of evidence or proof to submit a case to the jury as procedural and controlled by federal and not local, state law. The opinions and practice of the Court of Appeals for the Fourth Circuit, however, are in conflict with that of the Court of Appeals for the Eighth Circuit, expressed in *Clay County Cotton Co. v. Home Life Ins. Co.* (C. A. 8, Ark.), 112 F. (2d) 856, 861:

> "The appellee contends that in directing a verdict in this case the court was merely applying the procedure of the forum, that federal decisions and not the law of Arkansas control; or in other words, that the problem presented is one of adjective and not substantive law. The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied. This is too definitely settled to admit of further argument. (Citing *Erie Railroad Company v. Tompkins, supra.*)"

The Circuit Courts of Appeal are not ~~in~~ agreement on this question as appears from the tabulation of cases in footnote,[1] but a majority of the Circuit Courts apply state tests

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v. Frozen Food, Inc., v. Norfolk Southern R. Co., supra. See Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174 and 5 Moore's Federal Practice (2 Ed. 1951), Sec. 38.10.

[1] A majority of the Circuits apply state tests:

Second Circuit: *Rowe v. Pennsylvania Greyhound Lines, Inc.* (C. A. 2, N. Y.), 231 F. (2d) 922.

Third Circuit: *Cooper v. Brown* (C. A. 3, Pa.), 126 F. (2d) 874.

Sixth Circuit: *Lovas v. General Motors Corp.* (C. A. 6, Ohio), 212 F. (2d) 805.

Seventh Circuit: *Rytex Co. v. Ryan* (C. A. 7, 111), 126 F. (2d) 952, 954.

Eighth Circuit: *Clay County Cotton Co. v. Home Life Ins. Co.* (C. A. 8, Ark.), 112 F. (2d) 856.

A minority of the Circuits apply federal tests:

Fourth Circuit: *Davis Frozen Foods, Inc., v. Norfolk Southern R. Co.* (C. A. 4, N. C.), 204 F. (2d) 839.

Fifth Circuit: *Reuter v. Eastern Air Lines, Inc.* (C. A. 5, Ala.), 226 F. (2d) 443.

Tenth Circuit: *Diederich v. American News Co.* (C. A. 10, Okla.), 128 F. (2d) 144.

in determining the sufficiency of evidence for submission of a case to the jury.

In the factual finding reached by the Court of Appeals from its own view of the testimony, the Court below did not apply the scintilla test which prevails in South Carolina to petitioner's case; and, furthermore, in deciding the issue of negligence, the Court below even went so far as to determine the question of foreseeability involved therein according to a test different from that of South Carolina. The deposition of Calvin O. Berry, the crane operator, was taken by respondents. At the taking of his deposition, upon direct examination conducted by counsel for respondent Carolina Power & Light Company, he testified as follows:

"Q. So then, do you say that it was the tilt in the crane that caused the crane to contact the power line?

A. Well, in a way yes and in a way no.

Q. Well now, what do you mean by that? You will have to explain that?

A. If the power line hadn't been so close there, it wouldn't have come in contact.

The Court of Appeals concluded that the location of the sidetrack and the carload of steel required to be unloaded by a crane were not located too close to the high voltage, uninsulated electric power line mainly upon evidence of respondents' compliance with the minimum clearance requirements prescribed by the public service commission. The Court stated in its opinion that compliance with the minimum clearance requirements "is, at least some evidence of the exercise of due care." (App. 24) (Emphasis by

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The opinion of the Court of Appeals cites *Elliot v. Black River Elec. Co-op.*, 233 S. C. 239, 104 S. E. (2d) 357, 362, but the language of the Court in that case is plainly to the effect that the crucial question, *viz.*, Was the electric power line negligently located, is a question of fact for the jury and not a question of law for the Court. In the *Elliot case, supra*, the South Carolina Supreme Court declared:

"But assuming that it was a 'building' within the meaning of the regulation, compliance with the minimum clearance requirements was not conclusive evidence of due care in that regard.

Court of Appeals.) This evidence is not deemed conclusive of the negligence issue under South Carolina law. See footnote 5. Also, for a good statement of the principle involved, note the expression of the Court in *Jensen v. Sou. Pac. Co.*, 278 P. (2d) 703, 707:

> "The state, in prescribing such safety regulations has never gone so far as to say to a utility company that compliance therewith constitutes a complete discharge of its duties toward the public. The state does not undertake to foresee and declare in advance what under all circumstances constitutes ordinary care. Legislation of this nature lays down minimum, not maximum requirements."

The Court of Appeals in permitting disposition of this case on a summary judgment treated the case as one in which there was no evidence pertaining to the allegations of petitioner's complaint. But this was not a case in which there was no evidence for the jury, as the fact finders, to pass upon. The evidence of record showed that respondent railroad company elected to construct a sidetrack that angled off towards a high voltage, uninsulated electric power line, extending the sidetrack to a point within 25 feet of the high voltage, uninsulated electric power line. The evidence of record showed that for a period of three years respondent power company knew of the close proximity of the sidetrack to its high voltage, uninsulated electric power line but did nothing to effect a removal of the sidetrack or electric power line to a safe distance, nor did anything in the alternative to insulate its wires or give notice that the wires were being used for the transmission of dangerous, high voltage electricity. The evidence of record showed that respondent railroad company located its freight car of steel

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Whether or not the defendant negligently located its high-voltage line was an issue to be determined in the light of all the facts and conditions disclosed by the testimony." (Emphasis supplied.)

required to be unloaded by a crane within 27 feet 8 inches of the high voltage, uninsulated, electric power line. The evidence of record in this case as well as certain allegations of the complaint not controverted by respondents' testimony and therefore appropriate for consideration on a motion for summary judgment, all rendered the fact question of the case a question for the jury and not the Court. The question of whether respondent power company failed to exercise the **very high degree of care** required of it and whether respondent railroad company failed to exercise the **ordinary care** required of it in maintaining a high voltage, uninsulated electric power line in close proximity to the sidetrack and locating thereat a freight car of steel required to be unloaded by a crane was a question of fact for the jury.

It would seem that, applying either the federal or state test of sufficiency of evidence to this case, to this case the question of whether or not respondents were jointly or severally negligent is a question properly for the jury and not the Court; certainly, giving petitioner benefit of the *scintilla* rule of evidence which prevails in South Carolina, submission to the jury of this question of fact for its determination would be required, with the testimony being that, at least a proximate cause of the accident, without which it would not have happened, was the fact that the high voltage, uninsulated electric power line was located "so close there" to the sidetrack.

In its opinion the Court of Appeals also, as a basis of its concluding the issue of negligence in favor of respondents, applied a test of foreseeability different from that which prevails in South Carolina, when it declared: "Applying this principle as announced in Mania (*Mania v. Potomac Elec. Power Co.*, 268 F. (2d) 793, 4th Cir., Cert. den. December 7, 1959), it is clear that the acts, conduct and omissions of Calvin Berry * were beyond the bounds of any-

* The crane operator.

thing which might reasonably have been anticipated by the power company." What might be reasonably anticipated by a power company, according to the Maryland test of foreseeability, is stated in the *Mania case, supra*, at page 797 of the opinion, as follows:

> "In accordance with these basic principles, the law does not require that a person, who maintains even so deadly an instrumentality as a high voltage electric wire, shall anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with the wires resulting in injury or death."

It may be that under the above stated test of foreseeability in a negligence case, one may escape from, or not be charged with liability, where the connecting line in the chain of causation can be denominated or deemed a "fortuitous circumstance." This is what the Fourth Circuit Court of Appeals deemed the connecting line of causation in the *Mania case, supra*, "one of those 'fortuitous circumstances'", as appears at page 798 of its opinion in the cited case. But the test of foreseeability, as it applies to cases of this kind in South Carolina, does not permit such latitude; and to make this point clear and positive the South Carolina State Supreme Court declared in the case of *Tobias v. Carolina Power & Light Co.*, 190 S. C. 184, 2 S. E. (2d) 686, that a wrongdoer "cannot shelter himself behind the defense that the actual consequence was one that **rarely** follows from that particular act." (Emphasis supplied.) The test of foreseeability which the Court of Appeals applied in the case herein was not according to the South Carolina test of foreseeability in a negligence case.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review (See *Dick v. New York*

Life Ins. Co., 359 U. S. 437, 445), in which there are conflicts among the Circuit Courts of Appeals which should be resolved by this Court, in the interest of uniform and orderly administration of justice in the Courts below.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:** A fair reading of the opinion of the Court below indicates that it treated the issue of negligence in this case as a mixed question of law and fact. Assuming, for purposes of argument, the question to be determined was not purely a fact question but a mixed one of both law and fact, it is clear that the question became one for determination by the jury and not the Court. It is the settled law of both this Court and the South Carolina Courts that where an issue in a case presents mixed questions of law and fact such questions should be submitted to the jury. *Tucker v. Spalding*, 13 U. S. 453; *Connor v. Johnson*, 59 S. C. 115, 137, 37 S. E. 240. In the first cited case this Court declared that "the ultimate answer to mixed questions of law and fact must come from the jury"; and in *Connor v. Johnson, supra*, the South Carolina State Supreme Court declared that under the law of South Carolina when the question to be decided is a mixed question of law and fact all that the court can properly do is "to lay down the principles of law applicable to the case, and leave the jury to apply those rules to the facts as found by them."

The Court below properly stated the principles of substantive law of South Carolina applicable to respondent power company which is that those who deal in the use of dangerous instrumentalities such as electricity "are required to exercise a very high degree of care in their construction, repair, inspection and maintenance in order to prevent injury to others." (Our quotation from *Lindy v.*

Telephone Co., 90 S. C. 25, 72 W. E. 558); *Eargle v. Sumter Lighting Company*, 110 S. C. 560, 567, 96 S. E. 909; *Hill v. Carolina Power & Light Company*, 204 S. C. 83, 28 S. E. (2d) 545. The Court, however, went on to determine the fact question involved as to whether or not respondent power company had exercised "a very high degree of care" in permitting its high voltage, uninsulated electric power line to be maintained within 27 feet 8 inches of respondent railroad company's sidetrack. Furthermore, in resolving the issue of negligence in this case as it did, the Court below dealt with the question of foreseeability, heretofore discussed and intervening negligence. In passing upon the latter question the Court below concluded that the respondents were not bound to foresee "the acts of omission and absence of caution on the part of Calvin Berry", the crane operator. The Court concluded that respondents were not liable upon its view of the facts on the question of intervening negligence. Petitioner respectfully urges that appropriate instructions to the jury on the South Carolina law pertaining to foreseeability and intervening negligence was properly for the Court but it was for the jury to apply such law to the facts as found by them. *Tucker v. Spalding, supra; Connor v. Johnson, supra.*

Petitioner cited to the Court of Appeals the law of South Carolina, which rarely relieves a wrongdoer from his negligence because of the intervening negligence of a third party. *Tate v. Claussen-Lawrence Const. Co.*, 168 S. C. 481, 493, 162 S. E. 826, and cases cited therein. *Tobias v. Power & Light Co.*, 190 S. C. 181, 2 S. E. (2d) 686. With respect to respondent railroad company, petitioner endeavored to demonstrate her position further to the Court of Appeals by pointing to a specific Court instruction applicable to the law of South Carolina and the facts of the instant case, approved in *Southern Railway Company v. Jones* (C. A. 6, Tenn.), 228 F. (2d) 203, 211, as follows:

"It was the duty of the railroad spotting the cars to exercise ordinary care to leave them in such condition that they would not by reason of defects in the cars or **precariousness of their positions**, be of potential danger to plaintiff's intestate—that is the deceased in this case—or others engaged in unloading operations in the cars further down hill. If it was reasonably foreseeable that original negligence, if any, existing in the form of defects or **dangerous location** would result in injury, either directly through such defects or location, as a result of intervening action from some third party, the fact that a third party negligently intervened would not relieve the railroad from liability for its original negligence, if it was originally negligent." (Emphasis supplied.)

It has been too firmly established by a long line of decisions of this Court to hardly require any discussion or argument that it is an undue invasion of the jury's historic function for a Court to weigh conflicting inferences and conclusions that may be drawn from the evidence.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621, teaches that "summary judgment is a drastic innovation which can easily be used to deny trial by jury." The Courts below recognize this principle. "A litigant has a right to a trial where there is the **slightest doubt** as to the facts," *Doehler Metal Furniture Co. v. United States* (C. A. 2, N. Y.), 149 F. (2d) 130. Petitioner respectfully urges that it is clear from all that we have endeavored to point out herein that the Court of Appeals did not observe these principles in the decision and opinion which it rendered.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for Writ of Certiorari.

Respectfully submitted,

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Attorneys for Petitioner.

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DECISION OF COURT OF APPEALS

(Argued November 11, 1959.

Decided January 6, 1960.)

Before: HAYNSWORTH AND BOREMAN, CIRCUIT JUDGES, AND ROSZEL C. THOMSEN, DISTRICT JUDGE.

William E. Chandler, Jr., (James P. Mozingo, III, on brief) for Appellant; David W. Robinson (A. Y. Arledge, and Robinson, McFadden & Dreher on brief) for Appellee Carolina Power & Light Company; and A. L. Hardee (Willcox, Hardee, Houck & Palmer on brief) for Appellee Atlantic Coast Line Railroad Company.

BOREMAN, Circuit Judge:

M. Melinda Berry, Administratrix of the estate of her son, Robert H. Berry, instituted this action against Atlantic Coast Line Railroad Company, hereinafter sometimes called "Railroad Company", and Carolina Power & Light Company, hereinafter sometimes called "Power Company", to recover damages for the wrongful death of her son allegedly due to the negligence of both defendants.

Railroad Company and Power Company joined in a motion for summary judgment based upon the pleadings, documents and proceedings in the case. Included among the pleadings and proceedings were the original complaint, amended complaint, second amended complaint, answers of the defendants to the complaints, a statement of Calvin O. Berry (who is hereinafter more fully identified) furnished to defendants' counsel by plaintiff's counsel, interrogatories propounded to plaintiff by the Power Company and answers thereto, interrogatories propounded by plaintiff to the Power Company and the Railroad Company and their answers thereto, interrogatories propounded to Wilhoit and St. Paul Mercury Indemnity Company (the connection of the latter with this case being hereinafter disclosed) and St. Paul's answers to interrogatories, a request by Power Company to plaintiff for admissions and plaintiff's responsive admissions, a plat, photographs, two affidavits of Calvin O. Berry dated June 6, 1959, and a

deposition of the same Calvin O. Berry taken January 31, 1957.

In its order granting the motion for summary judgment, the District Court stated:

> "After consideration of the evidence introduced on behalf of the parties, it is my opinion that it is perfectly clear that no issue of fact is involved and that inquiry into the facts is not desirable to clarify the application of the law. There does not appear to be any dispute as to the evidentiary facts in this case or as to the conclusion to be drawn therefrom. It is quite clear what the truth is and no genuine issue remains for trial. In my opinion there is no evidence of any actionable negligence upon which the plaintiff can recover against the defendants. * * *"

Robert H. Berry, sixteen years of age, was employed by Wilhoit Steel Erectors, hereinafter referred to as "Wilhoit". On December 3, 1955, he was directed by his employer to accompany his brother, another Wilhoit employee, Calvin O. Berry, to Revels Station, near Florence, South Carolina, to assist in unloading steel from a gondola railroad car which had been "spotted" on a railroad siding. The steel was consigned to Vulcraft Fabricators, hereinafter referred to as "Vulcraft".

At Revels Station, the main line of the Railroad Company runs in a south-north direction and at that point there is a siding consisting of two sidetracks. The second of these sidetracks, the one here involved, angles off from the first sidetrack in a northeasterly direction toward and then alongside a high voltage electric line of the Power Company. At the point where the second branches off from the first sidetrack, the distance between the track and the power line is about 70 feet. This distance decreases to approximately 27 feet 8.4 inches at the point where the railroad car was spotted for unloading.

Wilhoit had dispatched a crane mounted on a truck to the point of the unloading operations. Vulcraft provided the truck into which the steel was to be transferred from the railroad car. Easy access to the railroad car was had for the crane truck and the Vulcraft truck from a public

highway in close proximity to the scene of operations. Calvin O. Berry, who was several years older than his brother Robert, and who had had two and one-half to three years' experience with Wilhoit, was in charge of crane operations. The two Berry brothers were the only Wilhoit employees on the job although other help was provided by employees of Vulcraft.

For the unloading operation, the crane was positioned alongside the gondola railroad car. The Vulcraft truck was placed on the other side of the crane so that the crane was between the railroad car and the Vulcraft truck. Both the crane and the Vulcraft truck were between the railroad car and the power line. So positioned, the crane could hoist the steel from the railroad car, swing its load in the direction of the power line, toward and over the Vulcraft truck, and deposit the steel in the truck.

Upon arriving at the job site with the crane, Calvin O. Berry carefully surveyed the surroundings, observed the power line and, with Robert Berry's help, removed a fifteen foot section of the boom of the crane so that the top of the boom, measured perpendicularly, was 28 feet from the ground. His reason for so doing, as stated in his deposition, was to reduce the danger of the operation and to keep the boom of the crane away from the electric wires. The crane truck was equipped with four outriggers designed to afford additional stability and to keep the crane truck from tipping as heavy loads were handled by the boom of the crane. Two of the outriggers at the rear of the crane truck were placed in position and blocked up but the two outriggers at the front were not used.

The crane and the Vulcraft truck having been so positioned, the unloading operation began. Calvin Berry, operating the crane, hooked on to a bundle of steel weighing between four and five tons, hoisted it from the railroad car, pivoted the crane in a counterclockwise direction toward the truck and lowered the steel to a level where Robert Berry and a Vulcraft employee, both of whom were standing on the ground, could steady it preparatory to dipositing it in the Vulcraft truck. As the steel was being lowered it was swaying and Robert placed his hand on it, but the

swaying of the load caused the crane to tilt toward the power line so that the steel cable running from the end of the boom to the hoisted steel came in contact with the power line. Robert was electrocuted from the charge of electricity carried through the cable of the crane into the steel and through his body into the ground.

The power line carried 22,000 volts between any two of the energized conductors and the voltage was 13,000 between any one energized conductor and the ground. The distance from the contacted electric wire to the ground was some 28 feet 3 inches and, as before stated, the distance on the ground from the near rail of the sidetrack to a point directly under the contacted wire was some 27 feet 8.4 inches. It appears that the railroad sidetrack was constructed in the year 1932 but the power line was constructed and maintained for many years prior thereto. It further appears that Calvin Berry was unfamiliar with Revels Station which was in a rural area; that upon arriving at the scene he observed the electric line and, even though he did not know its voltage, realized that a line carrying as much as 110 volts of electricity was dangerous; and that the cable would not have come in contact with the power line had the crane not tilted.

It is alleged in the plaintiff's second amended complaint and admitted in answers that the plaintiff received, under the provisions of South Carolina Workmen's Compensation Act, $8,000 which was paid by St. Paul Mercury Indemnity Company as insurer for Wilhoit, Robert Berry's employer, and that said Indemnity Company is, by right of subrogation, first entitled to be repaid the sum of $8,000 out of any recovery in this action.

Plaintiff contends that the pleadings and proceedings properly before the court indicated evidence of negligence on the part of both the Power Company and the Railroad Company sufficient to create an issue of fact for jury determination and that it was error to grant the motion for summary judgment in favor of the defendants.

ALLEGED NEGLIGENCE OF POWER COMPANY

Plaintiff urges that it is clearly within the realm of foreseeability that a railroad siding would be used to unload such materials as steel throguh the use of a crane. She charges that the Power Company would be liable for *any* injury resulting from the use of a crane since the Power Company knew, or should have known, of the potential hazards in permitting its electric lines to remain in such close proximity to the siding. Plaintiff further contends that if relocation of the power lines were not required, the Power Company should have insulated the wires or should have posted adequate warning signs. Plaintiff's contentions present the primary question for determination here, namely: Were the power lines in such close proximity to the railroad siding as to create generally a dangerous and hazardous condition to persons, including Robert Berry, unloading a railroad car of steel while exercising the prudence and care which the Power Company had a right to assume would be exercised?

Section 58-111, South Carolina Code of 1952, vests in the Public Service Commission the power to determine reasonable standards, classifications, regulations, practices and measurements of service to be furnished by public utilities. Section 24-112, South Carolina Code of 1952, provides that the Commission may make such rules and regulations not inconsistent with law as may be proper in the exercise of its powers or for the performance of its duties, all of which shall have the force of law. Pursuant to its authority, the South Carolina Public Service Commission has adopted and promulgated rules and regulations intended to specify, under varying circumstances, certain distances from the near rail of a railroad track within which electric power poles cannot be placed, and the minimum height of electric power lines above ground. Rule 14, 7 S. C. Code of 1952, pp. 817-819. The Rule states that the pole or tower carrying electric lines shall not be less than 12 feet from the near rail except, at sidings, not less than 7 feet from the near rail. The table of height requirements as set forth in Rule 14 provides that in rural areas electric power lines carrying 15,000 to 50,000 volts

must be no less than 20 feet above the ground when the line runs in a public right of way. Clearly, the requirements as to the location of poles and lines are more than met by the Power Company in the instant case.

While we do not find, nor has our attention been directed to, any cases in which the Supreme Court of South Carolina has affirmatively held, as have courts in other jurisdictions,* that compliance with the requirements of such rules and regulations is prima facie evidence of the exercise of due care, the court, in *Elliott v. Black River Elec. Co-op.*, 233 S. C. 233, 104 S. E. (2d) 357, 362 (1958), said:

"* * * compliance with the minimum clearance requirements was not *conclusive* evidence of due care * * *" under the circumstances. (Emphasis supplied). It may fairly be inferred from the quoted language that South Carolina recognizes that compliance, by an electric company, with pertinent rules and regulations is, at least, *some* evidence of the exercise of due care.

It is generally held and stated, as contended by the plaintiff, that those in control of a dangerous instrumentality, such as electricity, have a duty to exercise a very high degree of care to prevent injury to others. To so define and describe the requirement of care is merely a more forceful way of saying that ordinary care *under the circumstances* is required. "* * * The ordinary care required under the circumstances is relatively a high degree of care when

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*It is stated in *Probart v. Idaho Power Co.*, 258 P. (2d) 361, 364 (Idaho 1953), that: "Where a safety code is adopted by the state and constitutes a guide for electric companies, the construction and maintenance of a line in accordance with such code, constitutes *prima facie* evidence of the absence of negligence." See *Isbell v. Union Light, Heat & Power Co.*, 162 F. Supp. 471, 474 (E. D. Ky. 1958); *Rudd v. Public Serv. Co.*, 126 F. Supp. 722, 724 (N. D. Okla. 1954); *Merlo v. Public Serv. Co.*, 381 Ill. 300, 45 N. E. (2d) 665 (1942); *Southwestern Gas & Elec. Co. v. Deshazo*, 199 Ark. 1078, 138 S. W. (2d) 397 (1940). The South Carolina Public Service Commission rules and regulations were patterned after the National Electrical Safety Code (5th Ed. 1941) published by the Bureau of Standards, U. S. Department of Commerce. An indication of the weight attached to this code, even in states where it has not received legislative sanction, is apparent from the following statement in *Smith v. Iowa Public Serv. Co.*, 6 N. W. (2d) 123 (Iowa 1942): "While this code has, insofar as this case is concerned, no legislative sanction, it is difficult to conceive a better test of care than compliance with its provisions."

put into practice." *Elliott v. Black River Elec. Co-op., supra.* See also *Lundy v. Southern Bell Tel. & Tel. Co.*, 90 S. C. 25, 72 S. E. 558 (1911); *Earle v. Sumter Lighting Co.*, 110 S. C. 560, 96 S. E. 909 (1918).

The test of the existence or absence of negligence, as set forth in the South Carolina decisions by which we are bound in this case, is not whether the Power Company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable action or conduct by people in dangerous proximity to its high voltage line. *Elliott v. Black River Elec. Co-op., supra.* The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable in the exercise of due care there is no liability. One is not charged with foreseeing that which could not reasonably be expected to happen. *Woody v. South Carolina Power Co.*, 202 S. C. 73, 24 S. E. (2d) 121 (1943), and cases cited therein.

We are of the opinion that there is nothing in the record to indicate that the Power Company failed to comply with its duty to exercise a very high degree of care. Aside from compliance with the rules and regulations of the Public Service Commission, a thorough study of the plats and photographs submitted indicates that the clearance between the railroad siding and the power line was more than ample to permit the safe unloading of the carload of steel by the use of a crane. Moreover, the deposition of Calvin Berry, an experienced crane operator, disclosed that he saw the power lines, recognized them to be power lines and, with knowledge that a line carrying only 110 volts of electricity is dangerous, took only two of several possible precautions to protect the workmen, including Robert Berry, from this known danger. While he could have positioned the Vulcraft truck and the crane so as to render negligible the possibility of dangerous contact with the power line, or could have made use of the outriggers at the front of the crane truck to afford added stability, or could have asked the Power Company to shut off the electric current while the men were working there, he chose only to shorten the

boom of the crane and to set the outriggers at the rear of the truck. This conduct on the part of Calvin Berry is beyond the realm of reasonable foreseeability.

Plaintiff places great reliance upon *Tobias v. Carolina Power & Light Co.*, 190 S. C. 181, 2 S. E. (2d) 686 (1939), wherein the court said:

> "The liability of a person charged with negligence does not depend on the question whether with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission. * * * and the doer of the act cannot shelter himself behind the defense that the actual consequence was one that rarely follows from that particular act. * * *"

In that case, the plaintiff was injured when struck by an automobile and thrown against an exposed guy wire of the electric company. The electric company's pole was located about the center of the highway with two guy wires anchored to the ground, one on either side of the pole. Guards or boards around the guy wires had been maintained, but at the time of the accident no such guards were present. The electric company contended that it could not be expected to foresee the intervention of the ngligent third-party automobile driver and especially was this true since the accident was such a peculiar or unusual one. It further contended that the complaint disclosed that the injury to the plaintiff was due to the independent efficient intervening acts of the third party. This contention, in itself, assumes original negligence on the part of the electric company but argues that the effect of the original negligence was rendered nugatory by the intervening negligence of a third party.

We are of the opinion that the *Tobias case* is clearly distinguishable from the case at bar. In its opinion, the court made no reference to original negligence except to say that the electric company should have foreseen that its negligence would probably result in injury of some kind to some one. The reason for the failure to challenge the

fact that the electric company was guilty of original negligence is clear. The pole and guy wires were near the center of the road, and the electric company had indicated its acknowledgment of danger by taking steps in the past to place guards around the guy wires. In the case at bar, the Power Company maintained its lines at a distance from the railroad siding substantially greater than the minimum distance required in the rules and regulations. Since there is nothing to indicate that the Power Company was originally negligent, and concluding that it was not bound to reasonably foresee the acts of omission and the absence of caution on the part of Calvin Berry, no question of intervening negligence arises.

The test applied in Tobias is that liability follows for any injury which is a natural and probable consequence of the defendant's negligent acts or omissions. That test is no different from the test applied in numerous South Carolina cases—that an intervening negligent act does not relieve the original wrongdoer, if such act is reasonably foreseeable. See *Burns v. Carolina Power & Light Co.*, 193 F. (2d) 525 (4th Cir. 1951); *Ayers v. Atlantic Greyhound Corp.*, 208 S. C. 267, 37 S. E. (2d) 737 (1946); *Hunter v. Boyd*, 203 S. C. 518, 28 S. E. (2d) 412 (1943); *Pfaehler v. Ten Cent Taxi Co.*, 198 S. C. 476, 18 S. E. (2d) 331 (1942). Reasonable foreseeability requires only that one foresee those injuries which naturally and probably follow from his act or omission. *Woody v. South Carolina Power Co., supra.*

This court recently had occasion to decide a case arising under Maryland law, namely, *Manaia v. Potomac Elec. Power Co.*, 268 F. (2d) 793 (4th Cir. 1959), cert. den. December 7, 1959, ... U. S. ...., in which the facts are not wholly dissimilar from the facts in the instant case. There, a crane operator, after observing electric power lines spanning a public street, raised the boom of his crane dangerously close to the lines. As a result, the 33,000 volts of electricity arced to the boom of the crane killing two employees who were in contact with both the ground and the piece of equipment that was being hoisted. There, as here, the crane operator knew that the lines were electric

lines. It was contended that the electric company should have done something more to warn the contractor and its employees of danger from the high voltage line. Speaking through Judge Haynsworth, this court held that the electric company had a right to assume that a construction company would not intentionally foul its lines without taking steps to ascertain the voltage carried by the lines. All indications were that the line was of high voltage and the court said that this should have put the contractor on notice of the potential danger. In applying the reasonable foreseeability test, the court said that the construction company's course of conduct, "* * * fraught with seemingly grave and obvious danger, *while neglecting the equally practical alternatives which entailed no risk* * * *"; was beyond the bounds of anything which the electric company might reasonably have anticipated. (Emphasis supplied). We are of the opinion that this court would have reached the same conclusion in Manaia if controlled by the law of South Carolina rather than the law of Maryland. Applying this principle as announced in Manaia, it is clear that the acts, conduct and omissions of Calvin Berry were beyond the bounds of anything which might reasonably have been anticipated by the Power Company.

The plaintiff's contention that the Power Company was negligent in failing to insulate its wires or to post warning signs is equally without foundation or support in the record. In *Weeks v. Carolina Power & Light Co.*, 156 S. C. 158, 153 S. E. 119 (1930), the court, quoting from Corpus Juris, said:

> "The exercise of a sufficient degree of care requires a careful and proper insulation of all wires and appliances in places where there is a likelihood or reasonable probability of human contact therewith, and the exercise of due care to make and keep insultation perfect at places where people have a right to go on business or pleasure. 20 C. J. 355."

There is nothing in the record here to indicate that persons, in the ordinary course of business or pleasure, would contact a wire some 28 feet from the ground and some 27 feet from the near rail of the siding. On the contrary, it

appears that only by acts of negligent commission or omission would a person be brought in contact with the power line. Therefore, we reach the conclusion that the wires were amply insulated against human contact by their remote location and election above the ground. *Croxton v. Duke Power Co.*, 181 F. (2d) 306 (4th Cir. 1950).

Nor would the failure to post warning signs render the Power Company negligent in this case. Before the unloading operation began, the crane operator was aware of the presence of the electric lines and was also aware of the potential hazards attending the unloading operation. This is fully demonstrated by his precautionary action taken in shortening the boom of the crane. Therefore, warning signs could have accomplished only what the operator already knew—that contact with the line should be avoided.

ALLEGED NEGLIGENCE OF RAILROAD COMPANY

Plaintiff alleges negligence on the part of the Railroad Company in constructing and maintaining a sidetrack in close proximity to a high voltage, uninsulated electric power line, and in spotting a carload of steel in close proximity to such power line knowing that the unloading of the steel would involve the use of a crane. Once again, plaintiff's contentions present the real question for determination, namely: Was the railroad car spotted in such close proximity to the electric power line as to create generally a dangerous and hazardous condition to persons, including Robert Berry, unloading the car of steel while exercising the prudence and care which the Railroad Company had a right to assume would be exercised?

The status of Calvin and Robert Berry was that of invitees. Having placed the gondola car of steel on its siding, the Railroad Company invited the consignee of the steel, Vulcraft, to unload the steel at that point and this invitation would extend to those persons, the employees of Wilhoit, engaged by Vulcraft to do the job. Under South Carolina law, it is well settled that one who explicitly, or impliedly, invites others on his premises for lawful purposes is not an insurer of their safety, but if unsafe condi-

tions exist on the premises which are known to him, but unknown to the invitees, he must warn them. *Baker v. Clark*, 233 S. C. 20, 103 S. E. (2d) 395 (1958); *Bolen v. Strange*, 192 S. C. 284, 6 S. E. (2d) 466 (1939). Since the construction and maintenance of a sidetrack would not be considered the construction and maintenance of a dangerous instrumentality, the Railroad Company would owe only the duty of ordinary care. This duty, we are satified, appears to have been met.

In constructing its siding in October 1952, years after the power line had been erected, the Railroad Company complied with the rules and regulations of the Public Service Commission. While these rules and regulations were intended as prescribing minimum requirements for power companies, we are of opinion that they also served as an effective guide for railroads in constructing their tracks and sidings in the vicinity of existing power lines.

In explaining reasonable foreseeability, the court in *Boyleston v. Southern Ry.*, 211 S. C. 232, 44 S. E. (2d) 537 (1947), said:

> "Negligence carries with it liability for consequences which, in light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for injuries which, though possible, were wholly improbable. One is not charged with foreseeing that which could reasonably not be expected to happen. * * *"

See also *Green v. Atlantic & C. Air Line Ry.*, 131 S. C. 124, 126 S. E. 441 (1925). In the instant case, plaintiff urges that since the Railroad Company was negligent in constructing and maintaining its siding in close proximity to the electric power line, it is liable for all injuries resulting therefrom, regardless of the cause. To adopt the language of the court in *Johnston v. Atlantic Coast Line R. R.*, 183 S. C. 126, 190 S. E. 459 (1937): "* * * such conclusion, it seems to us, would be farfetched in the extreme, and would not only 'practically stretch foresight into omniscience', * * * but would in effect require the anticipation of 'whatever shall come to pass'. * * *." The duty of care required of one who invites persons on his premises

for some lawful purpose is that he disclose *known* unsafe conditions which are *unknown to the invitee*. *Baker v. Clark, supra; Bolen v. Strange, supra.*

We cannot say that the existence of a power line some 27 or 28 feet from the siding was an unsafe condition known to the Railroad Company. The actual distance from the near rail of the siding to a point on the ground immediately under the power line was approximately four times the minimum distance required by the rules and regulations of the Public Service Commission. The available space would indicate to a person of ordinary prudence that a crane could be used without danger. The record discloses that several precautions which might have been taken were ignored. All of these considerations support the Railroad Company's position that it did not know, and was not bound to know, of any unsafe condition.

Assuming that it could be found that the existence of the power line some 27 or 28 feet from the sidetrack was an unsafe condition known to the Railroad Company, still there was no duty to warn Calvin and Robert Berry because they, too, were fully aware of the existence and location of the power line. Under the doctrine of the *Baker* and *Bolen cases* hereinbefore cited, this knowledge obviated the necessity of warning by the Railroad Company.

Plaintiff relies upon *Southern Ry. v. Jones*, 228 F. (2d) 203 (6th Cir. 1955), and particularly upon an instruction on intervening cause approved by the court. Without quoting the instruction, it is sufficient to state that, in view of our conclusion that the Railroad Company was not negligent in the first instance in constructing its siding where it did, or in spotting its railroad car at the unloading point, under the circumstances it had no duty to warn Calvin and Robert Berry and no question of intervening negligence is presented. The only negligence was that of the employees of Wilhoit in failing to exercise the caution required of men of ordinary prudence.

SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 6 Moore, Federal Practice, ¶ 16 56.17 [42] (2d Ed. 1953), in commenting upon this rule, states that as a general proposition issues of negligence are ordinarily not susceptible of summary adjudication, but when the moving party clearly establishes that there is no genuine issue of material fact, summary judgment may be rendered.

After the moving parties, the Power Company and the Railroad Company, made a convincing showing that no genuine issue of fact as to actionable negligence existed, the plaintiff had the burden of showing that the defendants committed one or more negligent acts or omissions in the maintenance of the power line and spur track and that such negligence was a proximate cause of the death of Robert Berry. This responsibility included the burden of showing that one or both of the defendants knew, or reasonably should have known, that a dangerous condition existed in respect to the unloading operation and that there was a failure to exercise due care. The allegations of plaintiff's unverified complaint will not suffice. *Algar v. Yellow Cab Co.*, 255 F. (2d) 538 (D. C. Cir. 1958). Nor can the plaintiff subsequently question the completeness of the summary judgment record by pointing to the absence of facts which her evidence before a jury might have shown, when she has here made no attempt to present such evidence. *Morris v. Prefabrication Engineering Co.*, 181 F. (2d) 23 (5th Cir. 1950); *Wm. J. Kelley Co. v. RFC*, 172 F. (2d) 865 (1st Cir. 1949). On the contrary, the plaintiff's case must be judged solely on the record she has made before the trial judge in resisting the motion for summary judgment.

In *Bruce Const. Corp. v. United States*, 242 F. (2d) 873, 875 (5th Cir. 1957), speaking of the purpose and the application of Rule 56 in summary judgment proceedings, the court said:

"Consequently, when a movant make out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence."

In *Zoby v. American Fidelity Co.*, 242 F. (2d) 76, 80 (4th Cir. 1957), this court said:

"It is well settled, however, that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise; * * * His bare contention that the issue is disputable will not suffice."

While this court has been reluctant to grant summary judgment in negligence cases, it has not precluded that possibility. In *Pierce v. Ford Motor Co.*, 190 F. (2d) 910, 915 (4th Cir. 1951), Chief Judge Parker wrote:

"It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. * * *"

At page 916 of the opinion, Judge Parker quoted from *Sartor v. Arkansas Nat. Gas Co.*, 321 U. S. 620, 627, as follows:

"Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants from their right of trial by jury if they really have issues to try."

See also *Kirkpatrick v. Consolidated Underwriters*, 227 F. (2d) 228 (4th Cir. 1955).

The plaintiff has failed to carry her burden of showing that there is present here a genuine issue of material fact. There is no evidence of the existence of any fact which, when construed in the light most favorable to the plaintiff, will support the requisite inference that either defendant was negligent in respect to the death of Robert Berry. Here the parties do not disagree as to the material facts of the

case, their disagreement resting solely upon the application of the law to the facts. We are of the opinion that the action of the District Court in ordering summary judgment was proper and must be affirmed.

Affirmed.

SUMMARY JUDGMENT ORDER OF DISTRICT COURT

The above case is before me upon motion of the defendants for summary judgment.

After consideration of the evidence introduced on behalf of the parties, it is my opinion that it is perfectly clear that no issue of fact is involved and that inquiry into the facts is not desirable to clarify the application of the law. There does not appear to be any dispute as to the evidentiary facts in this case or as to the conclusion to be drawn therefrom. It is quite clear what the truth is and no genuine issue remains for trial.

In my opinion there is no evidence of any actionable negligence upon which the plaintiff can recover against the defendants, and for the foregoing reasons,

IT IS ORDERED, That the motion for summary judgment be and the same is hereby granted.

C. C. WYCHE,
United States District Judge,
(Sitting by Designation).

Dated:
Spartanburg, South Carolina,
June 12, 1959.

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IN THE

Supreme Court Of The United States

No. 833

M. MELINDA BERRY, Administratrix of the Estate of Robert H. Berry, Deceased, Petitioner,

Versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, and CAROLINA POWER & LIGHT COMPANY, a Corporation, Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinion of the District Court (App. 33) was not reported. The Opinion of the Court of Appeals is reported as *Berry v. Atlantic Coast Line Railroad Company, et al.*, 273 F. 2d 572 (App. 19).

JURISDICTION

The jurisdictional requisites are stated in the Petition.

QUESTIONS PRESENTED

I. The petition is based upon grounds not properly raised, litigated or passed upon below.

II. Certiorari does not lie to review the evidence.

III. In concluding that the motion for a summary judgment was properly granted, the Court of Appeals did

not apply a rule in regard to the sufficiency of the evidence different from that established by the South Carolina decisions.

IV. Under the Seventh Amendment, the scintilla rule is not applicable in Federal diversity cases.

V. The Circuit Court complied in all respects with the requirements of the Seventh Amendment of the United States Constitution.

STATEMENT

Robert H. Berry, an employee of Wilhoit Steel Erectors, was electrocuted when a crane operated by Calvin Berry, a brother and fellow employee, tilted into a transmission line of the defendant, Carolina Power & Light Company, while unloading steel from a gondola car on a siding of the defendant Atlantic Coast Line Railroad Company. This action was brought by his administratrix for her benefit and for the benefit of the St. Paul Mercury Indemnity Company, Wilhoit's Workmen's Compensation carrier.

The two Berry brothers, as the sole employees of Wilhoit present, were in charge of the unloading operation. They were assisted by help furnished by Vulcraft, the consignee of the steel. No employee of either defendant was present. According to the plaintiff's theory, Atlantic Coast Line was negligent in building the siding too close to the power line and in spotting a car on this siding which would be unloaded by the use of a crane. Carolina was negligent, she says, because it allowed the line to remain after the siding was built.

There is no dispute as to the facts. At the point where the crane touched the power line, the line was 28 feet 3 inches above the ground, whereas the South Carolina Public Service Commission's safety regulation provided for an elevation of not less than 20 feet. The distance on the ground from the near rail to a point under the nearest wire was 27 feet 8.4 inches, whereas the Commission's regulation requires only seven feet. App. 22-23.

Calvin Berry, the surviving brother, in his deposition and in his written statement disclosed that he saw the power line and recognized the danger of contact. While he shortened the boom of the crane to minimize the danger, he used only two of four available stabilizing outriggers and decided not to position the truck alongside the gondola which would have rendered negligible the chance of contact. He could have but did not ask that the current be cut off. These omissions on the part of the Berry brothers were the cause of the death of the intestate. App. 25-26. The record fails to show any actionable negligence on the part of either defendant.

In requesting a writ of certiorari, petitioner charges that the Court of Appeals violated the doctrine of *Erie v. Tompkins* in that it failed to follow the state "scintilla" rule in determining the sufficiency of the evidence and invaded the province of the jury contrary to the Seventh Amendment of the United States Constitution. The writ should not be granted for the following reasons: (1) The grounds of the Petition were not properly raised below; (2) this Court does not grant certiorari for the sole purpose of reviewing the evidence; (3) the Circuit Court applied the law of South Carolina in determining the sufficiency of the evidence; (4) the scintilla rule is not applicable in the federal courts; and (5) the Circuit Court complied in all respects with the requirements of the Seventh Amendment.

ARGUMENT

I

The petition is based upon grounds not properly raised, litigated or passed upon below.

The petitioner states as her reasons for granting the writ, a violation of the doctrine of *Erie v. Tompkins*, 304 U.S. 64, and an invasion of the province of the jury, contrary to the Seventh Amendment of the United States Constitution by the Circuit Court. Petition, p. 7, 13. Neither of these positions was presented by brief or oral argument

in the lower Courts.[1] This Court has consistently held that the writ of certiorari will not issue upon grounds not properly raised, litigated, or passed upon below, and therefore not adequately supported by the record. *Cleveland v. U. S.*, 323 U.S. 329; *Helvering v. Minn. Tea Co.*, 296 U.S. 378.

II

Certiorari does not lie to review the evidence.

This case involves no more than the application of the undisputed law of South Carolina to the uncontroverted facts before the Court. The District Court and the Court of Appeals concur in the result. Under such circumstances, this Court will not review the evidence presented.

> Granting the writ would not be warranted merely to review the evidence or inferences drawn from it . . . [Citations omitted.] . . . Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *General Talking Pictures Corp. v. Western Electric Company*, 304 U. S. 175, 178.

Southern Power Co. v. N. C. Public Service Commission, 263 U.S. 508; *U.S. v. James J. Johnson*, 268 U.S. 220; *Houston Oil Company v. Goodrich*, 245 U.S. 440; *Grace*

[1] In her "reasons for granting the writ" petitioner charges only the Court of Appeals with these errors. Petition, p. 7, 14. The Circuit Court simply affirmed the judgment of the District Court. Therefore these same objections were available for petitioner's appeal to the Circuit Court, but were not raised. In her "questions involved" petitioner recognizes this distinction. Petition, p. 2, 3.

The only questions raised in petitioner's appeal to the Fourth Circuit involved a review of the evidence. The argument headings in her brief there were:

> 1. Appellee Carolina Power & Light Company was guilty of actionable negligence in that after acquiring knowledge of the presence of the railroad side track in close proximity to its high voltage uninsulated power line it (1) did nothing to obtain a relocation of the electric power line or railroad side track, (2) did nothing to insulate its high voltage wires which ran in close proximity to the side track, and (3) did nothing to give notice of the nature, kind, or dangerous character of its high voltage wires located in close proximity to the side track.
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> 2. Appellee Atlantic Coast Line Railroad Company was guilty of actionable negligence in that (1) it constructed and maintained a side track in close proximity to a high voltage, uninsulated electric power line and (2) parked in close proximity to this high voltage, uninsulated electric power line the carload of steel for unloading by a crane

Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271. Especially is this rule applicable to a diversity case involving no issue of Federal law. *Magnum Co. v. Coty*, 262 U.S. 159, 163; *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (Frankfurter dissenting).

III

In concluding that the motion for summary judgment was properly granted, the Court of Appeals did not apply a rule in regard to the sufficiency of the evidence different from that established by the South Carolina decisions.

The Fourth Circuit followed the law of South Carolina in determining the sufficiency of the evidence when it concluded that the summary judgment record contained no evidence of actionable negligence by the respondents.[1] On the part of the Power Company, it said:

> We are of the opinion that there is nothing in the record to indicate that the Power Company failed to comply with its duty to exercise a very high degree of care. Appendix, p. 25.

In regard to the Railroad Company it concluded:

> We cannot say that the existence of a power line some 27 or 28 feet from the siding was an unsafe condition known to the Railroad Company. The actual distance from the near rail of the siding to a point on the ground immediately under the power line was approximately four times the minimum distance required by the rules and regulations of the Public Service Commission. The available space would indicate to a person of ordinary prudence that a crane could be used without danger. Appendix, page 31.

This is the exact test which petitioner contends should have been applied. Petition, p. 7. Under the South Carolina

[1] Even though it applied the South Carolina scintilla rule in determining the sufficiency of the evidence in granting the summary judgment against the petitioner, after concluding that no dispute existed as to the facts, the Circuit Court committed no reversible error since the Federal Rule, hereafter set forth, is less favorable to petitioner's position.

law, the Circuit Court having concluded that the record contained no evidence of negligence, there was no issue to submit to a jury under the scintilla rule.

Nor did the Circuit Court err in its application of the law of South Carolina to the undisputed facts of this action. In her petition, petitioner ignores her original burden of proving the existence of negligence and apparently would have respondents prove conclusively that they were *not negligent* in order to sustain the summary judgment. She urges that respondents' ample compliance with the safety regulations of the South Carolina Public Service Commission are not conclusive of the negligence issue. Yet the record contains no evidence that the standards met by the respondents were short of that degree of due care required of them under the existing circumstances. Undoubtedly had the facilities of either of the respondents not been located in the area, the unfortunate accident would not have occurred. But that is not the issue. Both were there under proper right and title and unless there is some evidence that they failed to exercise due care, they were not negligent.[3]

The record contains no evidence that the respondents' facilities constituted any danger to persons normally using the railroad facilities or in the area in the ordinary course of business or pleasure. The petitioner's deceased son and his brother, the crane operator, were fully appraised of the existence of these facilities and any danger they might have created to their particular operation. In fact, the undisputed evidence shows that their negligence, in failing to take the customary precautions, was the sole proximate cause of the accident. Appendix, p. 25, 31.

Finally, petitioner argues that the Fourth Circuit applied a test of foreseeability in regard to the Power Company different from that which prevails in South Carolina. As stated in its opinion, the Circuit Court applied the test of

> . . . whether it [the Power Company] should have foreseen the probability that injury might result from any reasonable action or conduct by people in dangerous

[3] The doctrine of *res ipsa loquitur* does not exist in South Carolina. *Daniels v. Timmons*, 233 S.C. 524, 89 S.E. 2d 129, cert. denied 349 U.S. 841.

> proximity to its high voltage line. [Citations omitted.] The law requires only reasonable foresight and when the injury complained of is not reasonably foreseeable in the exercise of due care there is no liability. One is not charged with foreseeing that which could not reasonably be expected to happen. Appendix, p. 25 [citation omitted].

and concluded that

> . . . This conduct on the part of Calvin Berry [the crane operator and brother of the deceased] is beyond the realm of reasonable foreseeability. Appendix, p. 26. [Phrases added.]

The South Carolina test in this regard is identical with that followed by the Circuit Court and is defined in *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E. 2d 121, 125, 126 (1943), where the plaintiff was injured when his car hit a high tension wire sagging across the highway. Minutes earlier another driver had negligently driven off the road and hit the pole previously supporting this sagging wire. The South Carolina Supreme Court freed the Power Company from liability even though it might have been negligent in the construction of its span across the highway.

> The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably have foreseen and anticipated them in light of the attendant circumstances. The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable and that which could not be expected to happen. [Citations omitted.]

See also *Elliott v. Black River Electric Co-op*, 233 S.C. 233, 104 S.E. 2d 357 (1958); *Ayers v. Atlantic Greyhound Corporation*, 208 S.C. 267, 37 S.E. 2d 737 (1946); *Hunter v. Boyd*, 203 S.C. 518, 28 S.E. 2d 413 (1943); *Pfaehler v.*

Ten Cent Taxi Co., 198 S.C. 476, 18 S.E. 2d 331 (1942); *Driggers v. The City of Florence*, 190 S.C. 209, 2 S.E. 2d 790 (1939).

The Circuit Court in affirming the decision of the District Court properly followed all phases of the South Carolina law, as directed by *Erie v. Tompkins*. Therefore, the only purpose to be served by the allowance of the petition would be a review of the evidence by this Court to determine the correctness of the Circuit Court's application of the State law to the undisputed facts and a further opportunity for the petitioner to be heard. This Court does not normally undertake these responsibilities.

IV

Under the Seventh Amendment, the scintilla rule is not applicable in Federal diversity cases.

Assuming that the "scintilla" rule, as defined by petitioner,[4] is applicable in South Carolina and that the Fourth Circuit failed to follow the South Carolina practice, which is denied, it is clear that the Federal Courts are in complete agreement that, under the doctrine of *Erie v. Tompkins*, 304 U.S. 64, the scintilla rule of evidence is not applicable in the decision of diversity cases.[5]

A state requirement that certain questions be left to the jury is not binding on a Federal Court in diversity actions in *Herron v. Southern Pacific Company*, 283 U.S. 91.

This doctrine was recently reaffirmed in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, and *Magenau v. Aetna Freight Line*, 360 U.S. 273, when this Court held that the converse of the above rule held true in spite of *Erie v. Tompkins*—that state practices requiring the determination of certain factual questions by the judge are not applicable to Federal Courts in diversity cases.

[4] Under *scintilla* the rule in South Carolina is that "if there *is any testimony whatsoever* to go to the jury on an issue involved in a cause" the case must be submitted to the jury. Petition, p. 7.

[5] In discussing this issue, respondents have assumed that in determining the sufficiency of the evidence for purposes of granting a summary judgment the test is the same as that applied in ruling upon a motion for directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 621, 6 Moore's Federal Practice, 2d Ed., 2032, 2101, Section 56.04[2] 56.15[1].

The aim of the Seventh Amendment is to preserve the substance of the common law rule of trial by jury and particularly to retain the common law distinction between the province of the Court and that of the jury. *Baltimore and Carolina Line v. Redmon*, 295 U.S. 654. The common law province of the trial judge, in determining what issues should be left to the jury, was defined by this Court in *Gunning v. Cooley*, 281 U.S. 90, as follows:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. In decisions establishing a more reasonable rule "that in every case, before the evidence is left to a jury, there is a preliminary question for the judge, not whether there is really no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Schuylkil & Prov. and R. Co. v. Munson*, 14 Wall. 442, 448, 20 Law Ed. 867, 872; *Pleasants v. Fant*, 22 Wall. 116, 122, 22 Law Ed. 780, 783.
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> Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury.

Nor are the opinions and practices of the Circuit Courts in conflict on this issue. They have consistently avoided the application of a "scintilla" rule in diversity cases.[*] None of the cases cited in footnote 4 on page 8 of

[*] Second Circuit: *Moore v. American Scantic Line*, 121 F. 2d 767; *Kvaro v. Swedish-American Lines*, 126 F. 2d 279.
Fourth Circuit: *Ralston Purina Co. v. Edmunds*, 241 F. 2d 164, cert. den. 335 U.S. 974.
Fifth Circuit: *Reuter v. Eastern Air Lines*, 226 F. 2d 443.
Sixth Circuit: *Commercial Casualty Co. v. Stinson*, 124 F. 2d 63; *Lovas v. General Motors Corporation*, 212 F. 2d 805.
Seventh Circuit: *Burg v. The Great Atlantic & Pacific Tea Co.*, 256 F. 2d 613; *Reitan v. Travelers Indemnity Co.*, 267 F. 2d 66.
Eighth Circuit: *Mounds Park Hospital v. Von Nye*, 245 F. 2d 756.
Ninth Circuit: *Trade Wind Transportation Co. v. Taylor*, 267 F. 2d 185; *Hawley v. Alaska Steamship Line*, 236 F. 2d 307.
Tenth Circuit: *Commercial Standard Insurance Company v. Foster*, 259 F. 2d 210.
D.C. Circuit: *Murray v. Towe*, 239 F. 2d 91; *Boland v. Love*, 222 F. 2d 27.

petitioner's petition as following "state test" involve the application of the "scintilla" rule.[1] Counsel for the respondents have been unable to find any Federal diversity case, since the decision in *Erie v. Tompkins*, in which such a measure of the sufficiency of the evidence was applied.

Admittedly, under the Erie doctrine, a Federal Court, in determining whether to submit issues to the jury, must determine whether under the applicable state decisions a cause of action has been proved. However, in determining whether there is sufficient evidence to create a factual issue to be resolved by a Federal jury, the Federal judge is first obligated to determine that there is sufficient evidence, as required by the Seventh Amendment, to support a jury verdict. Otherwise, if he were bound by petitioner's "scintilla" rule, a Federal District Judge is no more than a "monitor" of the court room and is no longer fulfilling his proper function in a Federal Court, an essential factor in the jury trial process for which the Constitution provides. Under the consistent opinions of this Court and the Circuit Courts, a state "scintilla" rule as defined by petitioner is not applicable in Federal diversity cases.

V.

The Circuit Court complied in all respects with the requirements of the Seventh Amendment of the United States Constitution.

This Court has frequently held that the requirements of the Seventh Amendment do not prevent a Federal trial

[1] *Lovas v. General Motors Corp.*, 212 F. 2d 805 (6th Cir. 1954), noting that a mere scintilla of evidence was not enough to submit the case to the jury.

Rowe v. Pennsylvania Greyhound Corp., 231 F. 2d 922 (2nd Cir. 1956), following the New York rule on sufficiency of the evidence, which required more than a mere scintilla of evidence.

Cooper v. Brown, 126 F. 2d 874 (3rd Cir. 1942), a non-jury case in which more than a scintilla of evidence was involved.

Rytex Co. v. Ryan, 126 F. 2d 952 (7th Cir. 1942), looking to the state substantive law to determine what constitutes unfair competition in affirming the dismissal of the complaint on a test involving more than a scintilla of evidence.

Clay Co. Cotton Co. v. Home Life Ins. Co., 113 F. 2d 856 (4th Cir. 1942), applying state substantive law, where the question of sufficiency of the evidence involved more than a mere scintilla.

judge from removing a case from a jury's province under the proper circumstances. *Galloway v. United States*, 319 U.S. 372; *North Penn. RR Co. v. Commercial National Bank of Chicago*, 123 U.S. 727. As stated by Justice Brandeis in *Matter of Peterson*, 253 U.S. 300:

> No one is entitled in a civil case to a trial by jury unless and except so far as there are issues of fact to be determined. Page 310.

As heretofore indicated the record in this case presents no issue of fact. The parties are in complete agreement on the circumstances of the accident and no conflict in the reasonable inferences to be drawn from these facts exists. Under such circumstances this Court has directed that it is a function of the trial judge alone to dispose of the case. *Chesapeake & Ohio RR Co. v. Martin*, 283 U.S. 209; *Atchison, Topeka & Santa Fe RR v. Toops*, 281 U.S. 351; *Gunning v. Cooley*, 281 U.S. 90; 5 Moore 2d Ed. 83, 2313-Sections 38.8[5], 50.02. Furthermore the use of the summary judgment process is proper in disposing of a case under such circumstances. That use is in no way an infringement upon the rights guaranteed by the Seventh Amendment. *Fidelity & Deposit Co. v. U.S.*, 187 U.S. 315; 6 Moore 2d Ed. 2037-2042, Section 56.06.

By terming certain issues as "mixed questions of law and fact" petitioner apparently contends that the Seventh Amendment requires that all *negligence* actions be submitted to a jury, even though no factual issue may exist. The sufficiency of evidence in negligence cases, as in any other actions, is first a question for the trial judge. *Phoenix Ins. Co. v. Doster*, 106 U.S. 30, 32; *Griggs v. Houston*, 104 U.S. 553; *Randall v. Baltimore & Ohio RR Co.*, 109 U.S. 478, 482; *Anderson Co. Commissioners v. Beal*, 113 U.S. 227, 241; *Schofield v. Chicago M. & St. P. R. Co.*, 114 U.S. 615, 618. *Delaware, Lackawana & Western RR v. Converse*, 139 U.S. 469, 472.

Other Circuit Courts have followed this test in granting summary judgments in cases involving issues of negli-

gence.[8] Thus it is clear that the action of the Fourth Circuit constituted no invasion of the province of the jury as defined by the Seventh Amendment.[9]

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[8] *Baggert v. Union Pacific RR Co.*, 240 F. 2d 207 (8th Cir. 1957); *Surkin v. Charteris*, 197 F. 2d 77 (5th Cir. 1952); *American Air Lines v. Ulen*, 186 F. 2d 529 (D.C. Cir. 1949); *Thomas v. Furness (Pac.) Limited*, 171 F. 2d 434 (9th Cir. 1948); *Wilkinson v. Powell*, 149 F. 2d 335 (5th Cir. 1945).

[9] In this regard the petition raises the same question passed upon by this Court in December 1959. *Manaia v. Potomac Elec. Power Co.*, 268 F. 2d 793, 798, 799 (4th Cir. 1959), cert. denied ____ U.S. ____, 4 Law Ed. 183 (1959) (Supreme Court Docket No. 397).